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No. 75-1547

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK DANIEL DIETER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–2a) and its order denying rehearing (App. C, *infra*, pp. 4a–5a) are not reported. The orders of the district court (Apps. D and E, *infra*, pp. 6a, 7a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 3a) was entered on November 6, 1975. The

government's timely petition for rehearing and suggestion for rehearing *en banc* were denied on February 24, 1976 (App. C, *infra,* pp. 4a–5a). On March 16, 1976, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including April 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the United States files a timely motion to set aside an order dismissing an indictment, the 30-day period within which to take an appeal begins to run from the date the district court denies the motion rather than the date the original order was entered.

STATUTORY PROVISIONS AND RULE INVOLVED

18 U.S.C. 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [*sic*] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States Attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

28 U.S.C. 1291 provides:

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 4(b) of the Federal Rules of Appellate Procedure provides in pertinent part:

> When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. * * *

STATEMENT

1. On the morning of March 14, 1973, a vehicle in which respondent was a passenger was stopped by Border Patrol agents at the permanent immigration traffic checkpoint near Truth-or-Consequences, New Mexico (App. I, *infra,* p. 13a). While questioning the two occupants of the vehicle concerning their citizenship, Agent Brown detected a strong odor of marihuana emanating from the automobile (*ibid.*). He directed the vehicle to the side of the road, and, upon inspection, discovered in the rear of the car two large wooden boxes containing kilo-sized bricks of marihuana (*id.* at 13a–14a).

An indictment returned in the United States District Court for the District of New Mexico charged respondent with possessing marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Respondent filed a pre-trial motion to suppress the marihuana on the ground that the search of the vehicle violated the Fourth Amendment. The motion was initially denied by the district court.

This Court thereafter ruled in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, that a warrantless roving patrol search of a vehicle for aliens, conducted without probable cause at a point removed from the border and its functional equivalents, was unreasonable under the Fourth Amendment. The Tenth Circuit subsequently held, in *United States* v. *King,* 485 F. 2d 353, and *United States* v. *Maddox,* 485 F. 2d 361, that the principles of *Almeida-Sanchez* should be applied to

similar searches at fixed traffic checkpoints conducted prior to the decision in *Almeida-Sanchez.*

On remand of *King* and *Maddox,* the present case was consolidated with those two and others for an evidentiary hearing on the issue whether the Truth-or-Consequences checkpoint is the functional equivalent of the border. The district court found that it is not a functional equivalent. *United States* v. *King, et al.,* D. N. Mex., Crim. Nos. 24560, *et al.,* September 9, 1974.

The district judge in the present case then reconsidered respondent's motion to suppress in light of these intervening developments. On October 4, 1974, the court entered an order dismissing the indictment on the assumption that the parties had agreed that "the facts herein are identical in all material respects with those in *United States* v. *King*" (App. D, *infra,* p. 6a). Twelve days later, on October 16, 1974, the government filed a motion to set aside the October 4 order on the ground that the facts were materially different from those in *King* and that "the Order dismissing the case was entered though inadvertence" (App. G, *infra,* p. 10a).[1]

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[1] The government relied on the Tenth Circuit's decision in *United States* v. *Bowman,* 487 F. 2d 1229, which upheld the lawfulness of a routine, warrantless stop of a vehicle for questioning at the Truth-or-Consequences checkpoint and a subsequent search of the vehicle when the agent smelled marihuana. The lawfulness of routine checkpoint stops of vehicles for the purpose of questioning the occupants concerning their nationality and immigration status is before this Court in *United States* v. *Martinez-Fuerte,* No. 74–1560, and *Sifuentes* v. *United States,* No. 75–5387. However, since the seizure in the instant case antedated this Court's decision in *Almeida-Sanchez,* the result here would not depend on the outcome of the pending cases.

The district judge, although believing that his October 4 order was "erroneously entered" on the basis of "a mistaken assumption" (App. H, *infra,* pp. 11a–12a), concluded that he had "no authority or jurisdiction" to set it aside and therefore denied the government's motion (App. E, *infra,* p. 7a). The order denying the motion was filed on November 6, 1974, and the government filed a notice of appeal on November 7, 1974 (App. F, *infra,* p. 8a).

2. After this Court ruled in *Bowen* v. *United States,* 422 U.S. 916, that *Almeida-Sanchez* should not be applied retroactively to checkpoint searches conducted prior to June 21, 1973, the government moved in the court of appeals for summary reversal of the district court's order dismissing the indictment. The court of appeals, without reaching the merits of the appeal and without the benefit of briefs or oral argument, dismissed the government's appeal as jurisdictionally out of time.

Although the government had moved to set aside the order of dismissal well within the 30-day period for taking an appeal prescribed by 18 U.S.C. 3731 and Rule 4(b) of the Federal Rules of Appellate Procedure, and had filed a notice of appeal one day after the motion was denied, the court of appeals ruled that the government's motion "was wholly ineffective to toll the running of the statutory appeal period" and that the government's notice of appeal, filed 34 days after entry of the order of dismissal, was therefore four days late (App. A, *infra,* p. 2a). The court

reasoned that "[f]undamental principles of sound judicial administration compel our conclusion that motions which toll appeal periods must be clearly and explicitly set out in the applicable rules" (*ibid.*). "Here," the court concluded, "there was virtually no authority which would permit the government's appeal period to be tolled by the motion" (*ibid.*).

In a supplemental opinion denying the government's petition for rehearing, the court of appeals sought to distinguish this Court's decision in *United States* v. *Healy,* 376 U.S. 75, which the government argued was controlling authority for its position. *Healy* had established that, under Rule 11(2) of the Rules of this Court and 18 U.S.C. 3731 (at that time permitting a direct appeal to this Court from an order dismissing an indictment), a timely petition for rehearing renders a district court's order of dismissal nonfinal for purposes of appeal and thus tolls the running of the appeal time.

The court of appeals reasoned that "the thrust of the government's petition for rehearing in [*Healy*] was directed squarely at an alleged error of law committed by the trial court in its interpretation of a criminal statute," whereas "in this case, the government's post-dismissal motion to set aside on the grounds of mistake or inadvertence was an entirely different species of pleading" (App. C, *infra,* p. 4a). The *Healy* petition, according to the court of appeals, "was the functional equivalent of a motion for new trial under Rule 59 of the Federal Rules of Civil Procedure,"

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which tolls the appeal period, but the motion here "was the functional equivalent of a Rule 60(b) motion [for relief from a judgment on the ground of mistake or inadvertence] which neither affects the finality of the underlying judgment nor suspends its operation" (*id.* at 5a).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals conflicts with this Court's decision in *United States* v. *Healy,* 376 U.S. 75. The Court there held that "in a criminal case a timely petition for rehearing by the Government filed within the permissible time for appeal renders the judgment not final for purposes of appeal until the court disposes of the petition" (376 U.S. at 77–78) and that the time for taking an appeal accordingly begins to run from the date that the court denies the petition for rehearing, not the date that the original judgment was entered.

That ruling rests on sound principles of judicial economy and expedition. As the Court stated, "to deprive the Government of the opportunity to petition a lower court for the correction of errors might, in some circumstances, actually prolong the process of litigation * * * and could, in some cases, impose an added and unnecessary burden of adjudication upon this Court" (*id.* at 80). The same policy is applicable with respect to appeals to the courts of appeals. See, *e.g., Bowman* v. *Loperena,* 311 U.S. 262; *Leishman* v. *Associated Wholesale Electric Co.,* 318 U.S. 203.

Under *Healy,* the government's appeal in this case was timely. The motion to set aside the district court's order dismissing the indictment was filed within the 30-day appeal period, and the notice of appeal was filed one day after that motion was denied by the court.[2]

Although the motion here was not labeled "petition for rehearing," it was no different in principle or in practical effect. Like a petition for rehearing, it asked the district court to "reconsider [a] question decided in the case" and sought an "alteration of the rights adjudicated" (*Department of Banking* v. *Pink,* 317 U.S. 264, 266). The motion alleged that "the Order dismissing the case was entered through inadvertence"; it requested that "the Order of dismissal be set aside and the case reinstated on the docket to proceed to prosecution" (App. G, *infra,* p. 10a). As in *Healy,*

[2] The district court denied the government's motion to set aside on the ground that it was without jurisdiction to grant the relief requested (App. E, *infra,* p. 7a). One might argue that the time for an appeal should not be extended by the filing of a motion that the district court has no jurisdiction to entertain. The court of appeals here, however, did not rest its decision on that ground, nor, in our view, could it properly have done so in the circumstances of this case. The district courts have "plenary power * * * to modify [a] judgment * * * or even revoke it altogether" (*Zimmern* v. *United States,* 298 U.S. 167, 169–170). As the decision in *Healy* itself makes plain, the absence of any specific provision in the Federal Rules of Criminal Procedure governing petitions for rehearing or motions to set aside does not disable a district court from considering such a petition or motion if, as here, it is filed within the time allowed for an appeal.

it would be "senseless" (376 U.S. at 80) for the appellate court to adjudicate an appeal while a timely motion seeking relief of that sort is pending in the lower court.

The court of appeals' attempt to distinguish the motion here from the petition for rehearing in *Healy* does not withstand analysis. The thrust of the court's supplemental opinion, as we understand it, is that petitions to correct errors of law toll the time for appeal but that petitions to correct mistakes of fact do not (see App. C, *infra,* pp. 4a–5a). But this Court has already rejected such a distinction, holding that a motion seeking "to amend or supplement the findings of fact in more than purely formal or mechanical aspects tolls the appeals statute" so that "the time for taking an appeal runs from the date of the order disposing of the motion" (*Leishman* v. *Associated Wholesale Electric Co., supra,* 318 U.S. at 206).

Moreover, to the extent that the court of appeals relied upon a purported distinction between errors of law and mistakes of fact, its decision conflicts with *United States* v. *St. Laurent,* 521 F. 2d 506 (C.A. 1). The First Circuit there held that a government appeal from a suppression order in a criminal case was timely because it was filed within 30 days of a denial of a timely motion for reconsideration The factual nature of the error sought to be corrected by the motion for reconsideration in *St. Laurent* did not vitiate its tolling effect. The court of appeals held, contrary to the supplemental opinion's analysis in the present case, that "[t]he distinction between a question of fact and a question of law, if indeed such can be made here, is of no significance that we can perceive in this situation" (521 F.2d at 512).

The First Circuit was right. In light of the policies served by the *Healy* rule, the pertinent inquiry in distinguishing between motions that do and motions that do not extend the time for filing an appeal is whether the relief sought would either eliminate the need to appeal or materially affect the nature of the appeal—*i.e.,* whether the motion "raise[s] questions of substance" rather than "mere matters of form" (*Leishman* v. *Associated Wholesale Electric Co., supra,* 318 U.S. at 205). Whether the alleged error can be characterized as factual or legal is irrelevant to that inquiry, because either category of error might warrant an "alteration of the rights adjudicated" (*Department of Banking* v. *Pink, supra,* 317 U.S. at 266).[3]

[3] The court of appeals' analysis in the supplemental opinion is not strengthened by its reliance on Rules 59 and 60(b) of the Federal Rules of Civil Procedure. Although a Rule 59 motion tolls the time for appeal, while a Rule 60(b) motion does not, that is not because of the grounds upon which the respective motions may be based but because of the more extended time periods within which a Rule 60(b) motion may be made. 7 Moore, *Federal Practice* ¶ 60.29, p. 414 (1975). Thus, a motion seeking a new trial on grounds specified in Rule 60(b) *will* suspend the running of the time for appeal if the motion is filed within the time allowed under Rule 59. See Advisory Committee Note to Rule 60(b), reproduced at 6A Moore, *supra* ¶ 60.01 [8], p. 4014.

Rule 60(b) by its terms provides for relief only from "a final judgment." It was designed to balance the need for finality of judgments, reflected in the rigid time limits within which mo-

2. The decision of the court of appeals, although it apparently will not be published, will have an immediate effect on practice in the Tenth Circuit. Because of the risk that the court of appeals may ultimately determine that a contemplated motion for reconsideration sought correction of factual rather than legal errors and therefore did not toll the time for appeal, litigants are likely to be discouraged from seeking corrective action initially in the district court. It will be safer to appeal immediately.

The policies underlying the tolling rule will accordingly be defeated. The opportunity for district courts promptly to correct their own errors will be lost, and an added and possibly unnecessary burden will be thrust upon the court of appeals. Litigation may be substantially prolonged because of unnecessary appeals.

The court of appeals' unwarranted departure from the longstanding procedural rule embodied in this Court's decisions therefore warrants prompt review by this Court.

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tions for the correction of errors under Rule 59 must be filed, and the competing principle favoring relief from unjust judgments. Rule 60(b) operates as a safety-valve to mitigate the harshness of the doctrine of finality in a case where a litigant discovers a meritorious claim for relief from a judgment, but not soon enough to raise it under Rule 59. See generally Moore and Rogers, *Federal Relief From Civil Judgments*, 55 Yale L. J. 623, 685–691 (1946).

Thus, even if the grounds upon which the government sought to set aside the order of dismissal in the present case are analogous to those that would be cognizable under Rule 60(b), it does not follow that they would not also be cognizable under Rule 59 if, as here, they were timely presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.
JEROME M. FEIT,
MICHAEL MOORE,
Attorneys.

APRIL 1976.

APPENDIX A

[Not for routine publication]

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 74–1767

UNITED STATES OF AMERICA PLAINTIFF-APPELLANT

v.

FRANK DANIEL DIETER DEFENDANT-APPELLEE

FILED NOVEMBER 6, 1975

Appeal From the United States District Court for the District of New Mexico (D. C. No. 25086–CR)

Before Honorable John C. Pickett, United States Senior Circuit Judge, and Honorable Oliver Seth and Honorable Robert H. McWilliams, United States Circuit Judges

PER CURIAM

Appellee Dieter was indicted early in 1973 for violation of 21 U.S.C. 841(a)(1). Following the denial of the defendant's motion to suppress certain evidence, but before trial, the district court dismissed the indictment on the basis of determinations made following the hearings required by our earlier mandates in *United States* v. *King,* 485, F.2d 353 (10th Cir. 1973) and *United States* v. *Maddox,* 485 F.2d 361 (10th Cir. 1973). The order of dismissal was entered on October 4, 1974, and thirty-four days later on November 7, 1974, the government filed a notice of appeal ". . .

from the order dismissing the indictment . . .". In the interim, however, the government, on October 16, 1974, filed a "Motion to Set Aside Order of Dismissal". Ultimately that motion was denied and this appeal followed.

Under 18 U.S.C. 3731, the government has the right of appeal under certain circumstances in criminal matters, however, an appeal pursuant to this statute *must* be taken within thirty days of the decision, judgment, or order appealed from. This requirement is both mandatory and jurisdictional. Here, the government's notice of appeal was untimely and therefore our appellate jurisdiction cannot and did not attach.

In our view, the government's motion to set aside the order of dismissal, filed October 16, 1974, was wholly ineffective to toll the running of the statutory appeal period. Rule 4(b) of the Federal Rules of Appellate Procedure, which relates generally to the length of appeal periods in criminal cases, contains no tolling provisions specifically applicable to government appeals. Fundamental principles of sound judicial administration compel our conclusion that motions which toll appeal periods must be clearly and explicitly set out in the applicable rules. Here, there was virtually no authority which would permit the government's appeal period to be tolled by the motion.

Accordingly, the purported appeal must be dismissed for lack of jurisdiction. In view of this disposition of the case, we need not consider appellant's motion for summary reversal.

Appeal dismissed.

APPENDIX B

United States Court of Appeals for the Tenth Circuit

September Term, November 6, 1975

No. 74–1767 (D.C. No. 25086–CR)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

FRANK DANIEL DIETER, DEFENDANT-APPELLEE

Before the Honorable JOHN C. PICKETT, *Senior Judge*, the Honorable OLIVER SETH and the Honorable ROBERT H. MCWILLIAMS, *Circuit Judges*

Upon consideration of the record on appeal and the files of this court, it is ordered that the appeal is dismissed for lack of jurisdiction, pursuant to Rule 8 on the Court's own motion.

HOWARD K. PHILLIPS, *Clerk*.

APPENDIX C

January Term, February 24, 1976

No. 74–1767

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

FRANK DANIEL DIETER, DEFENDANT-APPELLEE

Before the Honorable DAVID T. LEWIS, *Chief Judge*, the Honorable JOHN C. PICKETT, *Senior Circuit Judge*, the Honorable DELMAS C. HILL, the Honorable OLIVER SETH, the Honoroble WILLIAM J. HOLLOWAY, JR., the Honorable ROBERT H. McWILLIAMS, the Honorable JAMES E. BARRETT and the Honorable WILLIAM E. DOYLE, *Circuit Judges*

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Pickett, Seth, and McWilliams to whom the appeal was submitted. In our view, United States v. Healy, 376 U.S. 75 (1964) does not control under the unique facts of this case. As we read *Healy*, the thrust of the government's petition for rehearing in that case was directed squarely at an alleged error of law committed by the trial court in its interpretation of a criminal statute. However, in this case, the government's post-dismissal motion to set aside on the grounds of mistake or inadvertence was an entirely different species of pleading than

the petition involved in *Healy*. This difference is functional. *Healy* created a type of procedural parallelism under which the rules applicable to civil appeals may be applied in criminal appeals where there is absence of a rule specifically applicable to the situation. Accordingly, it seems to us that the *Healy* petition was the functional equivalent of a motion for new trial under Rule 59 of the Federal Rules of Civil Procedure. However, the motion in this case was the functional equivalent of a Rule 60(b) motion which neither affects the finality of the underlying judgment nor suspends its operation and was therefore ineffective to toll the running of the appeal period.

The petition for rehearing having been denied by the panel to whom the case was submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

HOWARD K. PHILLIPS, *Clerk*.

APPENDIX D

In the United States District Court for the District of New Mexico

No. 25086 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK DANIEL DIETER, DEFENDANT

ORDER

This matter coming on for consideration by the Court upon the agreement of the parties that the facts herein are identical in all material respects with those in *United States* v. *King,* No. 24560 Criminal, and the parties herein having participated in the joint hearing held in that cause, and the Court concluding that the decision therein is the law of this case, and that similar action should be taken; Now, Therefore,

IT IS BY THE COURT ORDERED that the Indictment herein is dismissed.

/s/ HOWARD BRATTON,
United States District Judge.

Filed October 4, 1974.

APPENDIX E

In the United States District Court for the District of New Mexico

No. 25086 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK DANIEL DIETER, DEFENDANT

ORDER

This matter coming on for consideration upon the Motion of the United States to set aside the Order of Dismissal as to the defendant Frank Daniel Dieter, and the Court having considered the same and concluding that it has no authority or jurisdiction to do so; Now, Therefore,

IT IS BY THE COURT ORDERED that the Motion to set aside the Order of Dismissal as to Frank Daniel Dieter is denied.

/s/ HOWARD BRATTON
United States District Judge.

Filed November 6, 1974.

APPENDIX F

In the District Court of the United States for the District of New Mexico

Criminal No. 25,086

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK DANIEL DIETER, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order dismissing the indictment in this action entered the 6th day of November, 1974.

VICTOR R. ORTEGA,
United States Attorney.

Filed November 7, 1974.

CERTIFICATE

Comes now Victor R. Ortega, United States Attorney for the State and District of New Mexico, pursuant to the provisions of Section 3731 of Title 18, United States Code, and certifies to Howard Bratton, United States District Judge, District of New Mexico, that the appeal filed in the above entitled criminal action is not taken for purposes of delay.

VICTOR R. ORTEGA,
United States Attorney.

Filed November 7, 1974.

APPENDIX G

In the District Court of the United States for the District of New Mexico

No. 25086 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK DANIEL DIETER, DEFENDANT

MOTION TO SET ASIDE ORDER OF DISMISSAL

Comes now the United States of America, plaintiff herein, by its undersigned attorneys, and states:

1. On October 4, 1974 this Court entered an Order dismissing the Indictment in Criminal Cause Number 25086 as against Frank Daniel Dieter, said Order being attached as Exhibit "A".

2. That said Order was based on a factual finding by the Court in which it was found that the instant case was opposite to *United States* v. *King,* No. 24560 Criminal.

3. That on April 25, 1973, Frank Daniel Dieter, with advice of counsel, entered into a Stipulation with the Government as to certain facts concerning his arrest.

4. That said Stipulation, attached hereto as Exhibit "B", indicates that the instant case is controlled by *United States* v. *Bowman,* 487 F.2d 1229 (CA 10 1973).

5. In view of the fact that this case is governed by *United States* v. *Bowman* rather than *United States* v. *King,* the government alleges the Order dismissing the case was entered through inadvertence.

WHEREFORE, plaintiff United States of America prays that the Order of dismissal be set aside and the case reinstated on the docket to proceed to prosecution in the ordinary course of the Court's schedule.

VICTOR R. ORTEGA,
United States Attorney.
W. R. HUGHES, Jr.
Assistant U.S. Attorney.
In the absence of
DON J. SVET,
Assistant U.S. Attorney.

Filed October 16, 1974.

APPENDIX H

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW MEXICO,
Albuquerque, N. Mex., October 23, 1974.

Re: *United States* v. *Frank Daniel Dieter,* No. 25,086 Criminal.

Hon. DON J. SVET,
Assistant U.S. Attorney,
Albuquerque, New Mexico 87103

JACK L. LOVE, Esq.,
Federal Public Defender,
Albuquerque, New Mexico 87103

GENTLEMEN: I have considered the motion to set aside the order of dismissal and the response thereto.

I am concerned over whether I have jurisdiction to enter an order setting aside the dismissal. At the time the order of dismissal was entered I was operating on the assumption that the case was a *King* type case. I had written a letter to that effect advising as to what I was going to do, and when there was no response, I did enter the order of dismissal.

While I was apparently operating under a mistaken assumption, I don't know how the order can be classed as any kind of a clerical error. I am further concerned whether it can in any way be considered an inadvertent order which can be corrected, because the order was exactly what I intended to do at the time it was entered.

In short, while it appears that the order was erroneously entered I seriously wonder whether I have any jurisdiction to do anything about it.

At the moment, I know of no authority which would give me jurisdiction to set aside the order of dismissal. I would appreciate your views and authority within a week from today.

Thank you for your attention to this matter.

Very truly yours,

HOWARD BRATTON, *Judge.*

APPENDIX I

In the District Court of the United States for the District of New Mexico

Criminal No. 25,086

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL JOHN FELLOWS and
FRANK DANIEL DIETER, DEFENDANTS

STIPULATION

IT IS HEREBY STIPULATED AND AGREED BY and between plaintiff, United States of America and defendant, FRANK DANIEL DIETER:

1. That if Border Patrol Agent Fred Brown were called and sworn as a witness he would testify as follows:

a. That he stopped a vehicle in which the defendant, FRANK DANIEL DIETER, was a passenger at approximately 8:45 a.m. on March 14, 1973, at Truth or Consequences, New Mexico.

b. That while questioning the two occupants of the vehicle as to their citizenship, he detected a strong odor of marihuana coming from the vehicle.

c. That after detecting this odor of marihuana he directed the vehicle to the side of the road for a closer inspection.

d. This inspection revealed two large orange wooden boxes lying in the rear of the vehicle and upon being

opened by Agent Brown, these boxes were found to contain kilo sized bricks of what he believed to be marihuana.

2. The marihuana seized from these two boxes is the subject of this indictment.

3. That said seizure was without a warrant and was without the consent of the defendant or any other person.

4. The seizure here was pursuant to a routine stop and detention of a motor vehicle for an alien search at a fixed checkpoint on Interstate 25 near Truth or Consequences, New Mexico, approximately 98 miles from the Mexican Border.

VICTOR R. ORTEGA,
United States Attorney.
DON J. SVET,
Assistant U.S. Attorney.
JACK LOVE,
Federal Public Defender representing Frank Daniel Dieter, defendant.
FRANK DANIEL DIETER,
Defendant.

Filed April 25, 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1976

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1547

UNITED STATES OF AMERICA,

Petitioner,

vs.

FRANK DANIEL DIETER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MEMORANDUM IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

FEDERAL PUBLIC DEFENDER
P. O. Box 306
Albuquerque, New Mexico 87103

By David E. Booth
Attorney for Respondent

July 1976

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1547

UNITED STATES OF AMERICA,

Petitioner,

vs.

FRANK DANIEL DIETER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Frank Daniel Dieter, through his court-appointed attorney, pursuant to Rule 53 of the Revised Rules of the Supreme Court of the United States, moves this Honorable Court to grant him leave to proceed in forma pauperis in his response to this Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals.

Presented herewith is a certificate of indigence to be filed with the Memorandum in Opposition to Petition for a Writ of Certiorari.

FEDERAL PUBLIC DEFENDER
P. O. Box 306
Albuquerque, New Mexico 87103

By David E. Booth
Attorney for Respondent

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1547

UNITED STATES OF AMERICA,

Petitioner,

vs.

FRANK DANIEL DIETER,

Respondent.

COUNSEL'S CERTIFICATE INDICATING PETITIONER'S INDIGENCE

Counsel, a member of the bar of this Court, states:

1. This present petition is a continuation of the cause, United States of America v. Frank Daniel Dieter, No. 25086 Criminal, in the United States District Court for the District of New Mexico.

2. In that case, Respondent was granted leave to proceed in forma pauperis on March 15, 1973.

3. No change in financial circumstances has occurred and as far as counsel can determine, the Respondent is without funds and assets to pay for the costs of this action.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P. O. Box 306
Albuquerque, New Mexico 87103

By Daniel E. Bostic
Attorney for Respondent

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1547

UNITED STATES OF AMERICA,

Petitioner,

vs.

FRANK DANIEL DIETER,

Respondent.

MEMORANDUM IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

1. The Decision of the Tenth Circuit Court of Appeals does not conflict with United States v. Healy, 376 U. S. 75 (1964).

The gist of the Government's argument in its Petition for a Writ of Certiorari is that the Tenth Circuit decision in this case (Government's Appendices A, B and C) conflicts with United States v. Healy, 376 U.S. 75 (1964). In its Petition the Government now views its Motion to Set Aside Order of Dismissal (Government's App. G) as a motion for rehearing instead of a motion made pursuant to Rule 60(b) of the Rules of Civil Procedure. If the Motion to Dismiss was actually a motion for rehearing then Healy is applicable. However, in the Motion to Dismiss the Government informed the District Court that the basis for the motion was the alleged "inadvertence" of the entry of the order of October 4, 1974 (Government's App. G). A motion based upon such alleged inadvertence

falls squarely within Rule 60(b) which provides in applicable part:

> Rule 60. Relief from Judgment or Order
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Once having put the District Court on notice of the basis of its motion the Government should not now be allowed to claim the motion was of a different nature than it appeared. The motion speaks for itself. The motion notified the District Court that it was founded upon inadvertence. Judge Bratton denied the motion, not because the Government could not support a motion for rehearing on the law, but because he could find no clerical errors or inadvertence (Government's App. H, p. 11a).

A Rule 60(b) motion does not toll the perica for filing a notice of appeal since it will not affect the finality of the judgment. The Government seeks to diminish the force of this analysis by relying upon United States v. St. Laurent, 521 F.2d 506 (1 Cir., 1975). In St. Laurent a Government notice of appeal was determined to be timely since it was filed within thirty days of the denial of a timely motion for reconsideration of a suppression order. The issue in St. Laurent pertained directly to the merits of the case. In the instant case the issue before the

district court only concerned the alleged inadvertence in issuing the order of October 4, 1974. The motion involved herein was essentially an auxiliary claim and did not deal with the merits of the original order dismissing the indictment.

> 2. Even though a District Judge on his own motion may modify his judgment for error of fact or of law or may even revoke his judgment, this does not mean the Motion to Set Aside the Order of Dismissal tolled the period in which the Government has to file its Notice of Appeal.

The Government addresses this point at page nine, footnote two of its Petition and cites Zimmern v. United States, 298 U.S. 167 (1936) as authority that the district court may amend a motion to confer jurisdiction. The Motion to Set Aside the Order of Dismissal was denied for lack of authority or jurisdiction to grant the motion.

Zimmern stands for the proposition that the district judge has power to "modify his [own] judgment for error of fact or law or even revoke it altogether." Zimmern at 169-170.

Zimmern does not address the judicial authority to amend a motion in order to confer jurisdiction. Jurisdiction may not be conferred if it does not exist and the court, on its own motion, may decline to proceed if jurisdiction is lacking. Pacific National Insurance Co. v. Transport Insurance Co., 341 F.2d 514 (8 Cir., 1965). Judge Bratton lacked jurisdiction to decide the Government's Motion to Set Aside the Order of Dismissal. The filing of a motion for which the court has no jurisdiction does not toll the time for appeal. See, Hulson v. Atchison, T. & S.F. Ry. Co., 289 F.2d 726 (7 Cir., 1961), cert. denied 368 U.S. 835.

3. The Government raises the spectre that if the Tenth Circuit's decision stands litigants will be discouraged from seeking initial relief in district court.

The Government addresses this point at page twelve of its Petition. This spectre is a false fear since filing a motion under Rule 60(b) does not preclude the filing of a motion for rehearing in the district court.

CONCLUSION

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P. O. Box 306
Albuquerque, New Mexico 87103

By David E. Booth
Attorney for Respondent

I hereby certify that on this 12th day of July, 1976, a copy of the foregoing Memorandum in Opposition to Petition for a Writ of Certiorari was mailed to the Solicitor General, Department of Justice, Washington, D. C. 20530; and to the United States Attorney, P. O. Box 607, Albuquerque, New Mexico 87103. All parties required to be served have been served.

David E. Booth